

ARKANSAS SUPREME COURT

No. CR 08-357

KEDRICK T. DARROUGH, SR.
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered October 23, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF DREW COUNTY, CR 2005-
66, HON. ROBERT B. GIBSON, JR.,
JUDGE

AFFIRMED.

PER CURIAM

In 2006, appellant Kedrick T. Darrough, Sr., was found guilty by a jury of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. Under an enhancement for a subsequent controlled substance conviction, he was sentenced to 840 months' and 240 months' imprisonment to be served consecutively. The Arkansas Court of Appeals affirmed. *Darrough v. State*, CACR 07-223 (Ark. App. Oct. 24, 2007). He then timely filed in the trial court a verified pro se petition pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

On appeal, appellant contends that the trial court erred in denying the Rule 37.1 petition by

failing to conduct an evidentiary hearing or to make written findings in support of the denial of the petition. He also contends that the trial court erred in finding that trial counsel was not ineffective in two instances.¹

For his first point, appellant complains that he was entitled to an evidentiary hearing on the Rule 37.1 petition. A trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). Pursuant to Rule 37.3(a), a court has discretion to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Id.* In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Id.*

Here, the trial court's order denying appellant's Rule 37.1 petition is sufficient to indicate that the court made its findings from the record and that the record supported its decision to deny appellant's petition. There is no merit to appellant's contentions that the trial court erred by not holding an evidentiary hearing and by not making written findings that set out the basis for denying the Rule 37.1 petition.

As the second point on appeal, appellant contends that the trial court erred in finding that trial counsel was not ineffective. Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the

¹In appellant's stated points on appeal, he raises an issue regarding his identity being a predicate requirement for relief. However, the issue of identity relates to a petition for writ of habeas corpus pursuant to Act 1780 of 2001, and not a claim under Rule 37.1.

wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

Appellant argued in the Rule 37.1 petition and on appeal that trial counsel was ineffective for failing to obtain the identity of the confidential informant and for failing to seek suppression of the drugs seized by the police during the traffic stop. Both of these claims of ineffective assistance of counsel are related to the traffic stop that led to appellant's arrest.

The facts adduced at trial were that a confidential informant ("CI") apprised the police that the car in which appellant was a passenger would be carrying large amounts of controlled substances. Based on this information, the police waited for the car and made a traffic stop.

At trial, Officer Ben Hines, who was with the Tenth Judicial District Drug Task Force, testified that after stopping the vehicle, officers approached the car on both the driver's side and the passenger's side. Upon exiting the car, appellant took a large garbage bag that was between him and the center console, threw it on the ground and said to the officers, "This is what you're looking for anyway." The garbage bag contained cocaine and eighty-nine bags of marijuana weighing 32 grams. In addition, the police discovered a bag of cocaine in appellant's jacket during the search incident to arrest, for a total of 385 grams of cocaine recovered.

As for appellant's rationale behind his ineffective assistance claims, he maintains that the police fabricated the existence of the CI as a pretext to legitimize a traffic stop that was made without probable cause. Appellant's first claim of ineffectiveness was that trial counsel failed to obtain the name of the CI, and also failed to reveal that the CI did not exist. In the second claim of ineffective counsel, he contends that exposure of the non-existence of the CI would have ultimately

led to suppression of the drugs seized during the traffic stop by showing that no probable cause existed for the officers' actions.

As to the confidential informant's identity, counsel sought the name of the CI in the defense's pretrial discovery motion, but the prosecutor did not disclose the CI's name either before or during the trial.² In denying the Rule 37.1 petition on this point, the trial court noted that appellant was not entitled to that information because the CI did not participate in commission of the crimes at issue.

Here, appellant does not demonstrate that the trial court erred in finding that counsel was not ineffective. This argument depends solely upon disclosure of the CI's name. However, appellant does not present authority to substantiate the defense's entitlement to the name of the CI. With no legal basis for disclosure, trial counsel cannot be found to be ineffective for pursuing an argument that has no merit. *Noel, supra*.

In addition, conclusory statements cannot be the basis of postconviction relief. *Jackson, supra*. In the instant matter, appellant's phantom-CI allegation comprises the linchpin of both ineffective assistance claims. However, appellant posits no facts substantiating this conclusory claim.

In appellant's next allegation of ineffective assistance regarding suppression of the drugs seized by police, counsel filed a pretrial motion to suppress. In response, the prosecutor argued that

²The addendum to appellant's brief on appeal contains a letter from the prosecutor to counsel stating that the identity of the CI would not be disclosed unless the CI were to be called as a witness at trial. The addendum also contains a letter from trial counsel to appellant that set out the prosecutor's refusal to disclose the CI's name and the authority upon which the prosecutor based this position. However, these documents were not contained in the record on appeal and there is no indication that the trial court considered these documents in making its ruling below. This court does not consider evidence not included in the record on appeal. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). Moreover, the overall purpose of Rule 37 never contemplated providing a means to add evidence to the record. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Even were we to consider these documents, they do not support appellant's argument of ineffective assistance.

appellant lacked standing to challenge the traffic stop as he was a passenger in the car.³ In its order denying the Rule 37.1 petition, the trial court also noted appellant's lack of standing under the Fourth Amendment as a passenger.

Although couched in terms of a claim of ineffective assistance, appellant is asking the trial court to make an evidentiary ruling as to suppression of the drugs. Evidentiary issues are not the proper basis for a Rule 37.1 petition. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). As a result, appellant's argument, to the extent that it exceeded a claim of ineffective assistance of counsel, is not cognizable under Rule 37.1. *Id.*

To the extent that appellant raises actual allegations of ineffective assistance of counsel, he fails to demonstrate that the trial court erred in finding that counsel was not ineffective on this point. Appellant did not establish a legal basis to find that he had standing to object to the traffic stop under the Fourth Amendment, thereby arguably leading to suppression of the drugs. Trial counsel cannot be found to be ineffective for continuing to argue a position that has no merit. *Noel, supra.*

Finally, appellant makes an additional argument that counsel was ineffective as shown by the alleged cumulative errors. The doctrine of cumulative error is not recognized in allegations of ineffective assistance of counsel. *Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003).

Affirmed.

³The record does not contain an order denying the motion, but the drugs were introduced at trial.